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No. 86-102 (A)

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK LEWIS SINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1986

QUESTIONS PRESENTED

1. Whether the indictment against petitioner should have been dismissed because petitioner's counsel of choice decided to withdraw after the prosecutor acquired and reviewed portions of the attorney's trial file and the prosecutor and the trial judge thereafter made public statements suggesting that the attorney had sponsored perjurious testimony at petitioner's first trial.

2. Whether the Double Jeopardy Clause precluded a retrial of petitioner after his conviction was reversed on the grounds of judicial misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (I Pet. App. 1-74) is reported at 785 F.2d 228. Earlier opinions of the court of appeals, affirming petitioner's conviction at his first trial and later reversing that conviction en banc, are reported at 687 F.2d 1135 and 710 F.2d 431.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1986. A petition for rehearing was denied on May 20, 1986. The petition for a writ of certiorari was filed on July 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiracy to import and distribute marijuana, in violation of 18 U.S.C. 371, and one count of attempt to distribute marijuana, in violation of 21 U.S.C. 846. He was sentenced to two consecutive five-year terms of imprisonment.

1. The evidence at trial, the sufficiency of which is not disputed, showed that between October 1977 and June 1978 petitioner and his co-conspirators obtained hundreds of pounds of marijuana each week and transported the drugs from Miami to the Minneapolis and San Francisco areas for distribution. The conspirators used private air freight forwarders and concealed the marijuana inside plastic crocks purportedly containing coral rock, shells, and photographic supplies. II Tr. 66, 73-74, 83-87, 113; III Tr. 383, 393; IV Tr. 536. Upon arrival, the marijuana was delivered to safe houses or stored in warehouse facilities. From there, it was weighed, placed into smaller packets, and distributed. IV Tr. 533-534.

Petitioner was initially a currency courier for the enterprise, making trips to collect drug proceeds no less than once a week and usually more often. Later, petitioner began to assume additional responsibilities in the enterprise. He obtained marijuana, packaged it, and delivered the parcels to the air freight forwarder. In addition, petitioner, a lawyer, acted as a legal adviser for the enterprise. In that capacity, he encouraged his co-conspirators, inter alia, to carry their cash in stamped envelopes, so as to reduce the risk that authorities might discover the cash without a search warrant. For his efforts, petitioner received

$10,000 to $20,000 per month. II Tr. 66, 77, 93-95; III Tr. 407; IV Tr. 540, 560-561.

On June 9, 1978, petitioner and a co-defendant were arrested at the Miami office of an air freight forwarder, attempting to ship several parcels containing marijuana. At the time, petitioner was carrying a folder that listed the address of a Miami warehouse in which police subsequently discovered marijuana. The folder also contained documents that referred to prior marijuana shipments and to tools and materials found in the warehouse. III Tr. 302-348.

2. Petitioner was tried twice; his first conviction was reversed because of misconduct by the trial court (I Pet. App. 3-4). On September 9, 1983, five days before the case was to be retried before another judge, the United States Attorney notified petitioner's attorney, Ronald I. Meshbesher, that he had received copies of 56 documents from Meshbesher's file pertaining to petitioner. On September 14, petitioner moved to dismiss the indictment, alleging that the government had engaged in misconduct in obtaining the file. I Pet. App. 4-5.

The hearing on this motion was scheduled before Judge Murphy, the new judge assigned to the case. At the hearing, Assistant United States Attorney Daniel W. Schermer, the prosecutor at the first trial, testified that he had received the documents in question from Marshall Stoll, one of petitioner's co-conspirators. Schermer explained that Stoll had advised him, prior to delivering the documents, that the materials would provide proof that perjury had been committed at the first trial. I Pet. App. 5.

Before the hearings were completed, the United States Attorney, the Minneapolis Chief of Police, and Judge Lord (who had presided at the first trial) gave

separate statements to the press regarding the file obtained from Meshbesher's office. According to the newspaper accounts, the statements asserted that the attorney's file showed that Gilbert Singer, petitioner's father, had committed perjury at the first trial and that he had done so with Meshbesher's approval. Thereafter, on September 20, 1983, Judge Lord wrote to Judge Murphy that "it has been my experience that defense counsel in criminal cases are much more interested in questions than in answers," and offered to testify at the hearings. Schermer also testified that between petitioner's conviction at the first trial and the filing of his post-trial motions, Judge Lord had initiated an ex parte meeting with Schermer to express concern about the trial record and to urge the government to supplement the record so as to avoid reversal on appeal. I Pet. App. 5-6.

Based on these new developments, petitioner enlarged his motion to dismiss to include the statements made to the press and the ex parte conduct of Judge Lord. Meshbesher also moved to withdraw as defense counsel, claiming that the newspaper accounts—together with what he perceived to be the possibility of his own prosecution for subornation of perjury—would chill his ability to represent petitioner. Judge Murphy granted the withdrawal request; on petitioner's motion, she also recused herself from presiding any further at the hearing. In her place, Judge G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas, was designated to complete the hearings. I Pet. App. 7-8.

After entertaining additional evidence over the next two months, Judge Eisele determined that while the government's use of Meshbesher's documents and

its subsequent statements to the press had violated petitioner's Sixth Amendment rights, there was no need to dismiss the indictment (I Pet. App. 8-9). The court found, first, that an employee in Meshbesher's law office—in no way connected with the government or with a law enforcement agency—had photocopied the file and turned it over to Stoll (I Pet. App. 10). The court found further that Assistant United States Attorney Schermer had researched the law and had concluded in good faith that the government could lawfully examine the file. But while a limited examination of the file was justified, Judge Eisele concluded that the government had examined portions of the file that were not related to the allegations of perjury. In so doing, the court held, the government had wrongfully intruded, though in good faith, into the attorney-client relationship, infringing petitioner's Sixth Amendment rights. I Pet. App. 11-13.

Judge Eisele concluded, however, that the violation did not warrant dismissing the indictment; instead, he fashioned a remedy to insulate petitioner on retrial from any effects of the violation. Judge Eisele ordered the government to return all documents from the file except those that it specifically represented contained evidence of perjury and subornation of perjury. He further ordered that no government attorney with knowledge of the documents be permitted to participate at the retrial. Finally, the court ordered that no law enforcement officer with knowledge of the contents of the documents be permitted to use them or mention them while working on the case. I Pet. App. 13-14; 785 F.2d 228, 232.

The district court next found that law enforcement officials had improperly leaked information about the

Meshbesher file to the press. While the court found that there was no intent to prejudice defendant upon retrial or to interfere with the attorney-client relationship, Judge Eisele held that the leaks potentially prejudiced Meshbesher's effectiveness, in violation of the Sixth Amendment. Nevertheless, the court concluded that Meshbesher's continued representation of petitioner was not untenable, and that he was not compelled to withdraw. The court reasoned that the passage of time or retrial in a different locale could adequately dissipate any potential prejudice and still permit petitioner to continue to be represented by his counsel of choice. Judge Eisele therefore permitted petitioner to move for a continuance or a change of venue; petitioner declined to make timely motions and Meshbesher refused to reconsider his withdrawal from the case. I Pet. App. 14-16.

Finally, Judge Eisele found that Judge Lord's ex parte contact with the government and other acts of misconduct did not demonstrate an intent to prejudice petitioner. Accordingly, Judge Eisele held, there was no double jeopardy bar to a retrial. I Pet. App. 16-17. On May 31, 1984, petitioner's retrial commenced, with new counsel, before Judge Murphy.[1] After an eight-day trial, petitioner was convicted. I Pet. App. 17, 20.

3. The court of appeals affirmed by a divided vote (I Pet. App. 1-74). The court accepted Judge Eisele's conclusion that the government's use of Meshbesher's file and the statements to the press had abridged peti-

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[1] Petitioner was represented by appointed counsel, while the government, pursuant to Judge Eisele's order, was represented by two Assistant United States Attorneys from the District of North Dakota. In addition, the case agent was replaced. I Pet. App. 17.

tioner's Sixth Amendment rights (I Pet. App. 25-26, 36-38). It held, however, that under this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), the constitutional violation did not require the indictment to be dismissed. The court upheld as not clearly erroneous the district court's finding that "either the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety" (I Pet. App. 38). By "permitt[ing] [petitioner] to move for a continuance or a change of venue" the district judge had "tailored a remedy to avoid prejudice and to remove the taint of the violation" (I Pet. App. 38-39). In light of this remedial option—which petitioner elected to forego—the court concluded that Judge Eisele did not err in finding that Meshbesher's continued representation of petitioner "was not untenable" (I Pet. App. 34, 39).[2]

The court also rejected petitioner's double jeopardy claim. Although it regarded as "complicated and close" the question whether retrial of a defendant is barred where his conviction has been reversed due to judicial misconduct, the court concluded that it was unnecessary to resolve that question in this case (I Pet. App. 48). Surveying the factual record, the court held that "[e]ven when colored by his post-trial misconduct," the actions of Judge Lord at the first trial "do[] not evince the bad faith or design to prejudice the defendant's prospects for acquittal that * * * are prerequisite to invocation of the double

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[2] Alternatively, the court held that "even if government officials' statements to the press did create in Meshbesher a conflict of interest requiring withdrawal, there is no claim that [petitioner's] appointed counsel rendered ineffective assistance" (I Pet. App. 34).

jeopardy bar" (I Pet. App. 51-52). Under these circumstances, the court concluded, retrial was the proper course (I Pet. App. 54).[3]

Judge Bright dissented (I Pet. App. 67-74). He concluded that defense counsel had been forced to withdraw and that Judge Eisele's order "did not serve as a curative for the government's conduct" (I Pet. App. 68). Because petitioner had lost "the services of his counsel of choice," Judge Bright would have ordered that the indictment be dismissed (I Pet. App. 74).

ARGUMENT

1. Petitioner contends (Pet. 31-47) that the prosecutor's conduct in examining Meshbesher's files, coupled with the statements made to the press by the government and by Judge Lord, caused petitioner to lose the services of his counsel of choice and thus violated his Sixth Amendment rights. As a consequence, he urges, the indictment against him should have been dismissed. The court of appeals agreed that petitioner's Sixth Amendment rights had been abridged; it nevertheless held that the dismissal of the indictment was unwarranted—first, because Meshbesher was not required to withdraw; and second, because, in light of the adequate trial performance of petitioner's replacement counsel, petitioner suffered no prejudice by losing Meshbesher's services.

In *United States* v. *Morrison*, 449 U.S. 361, 365 (1981), this Court held that where the government has violated a defendant's Sixth Amendment right to counsel, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is

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[3] The court also rejected several other legal claims not presented in the petition (I Pet. App. 26-34, 55-67).

plainly inappropriate, even though the violation may have been deliberate." In *Morrison*, federal agents sought to enlist the cooperation of an indicted defendant whom the agents knew to be represented by counsel. In the course of their overtures to the defendant, the agents disparaged the abilities of retained counsel and suggested that the defendant would be better off with a public defender. The court of appeals dismissed the indictment, but this Court reversed. The Court noted that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (449 U.S. at 364). Even where defendants have been "totally denied the assistance of counsel" or where "judicial action before or during trial prevented counsel from being fully effective" or where "law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer * * * the conviction in each case was reversed and the Government was free to proceed with a new trial" (*id.* at 364-365). "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial" (*id.* at 365). Accord, *United States* v. *Bell*, 776 F.2d 965, 971-973 (11th Cir. 1985), cert. denied, No. 85-1491 (June 23, 1986); *United States* v. *King*, 753 F.2d 1 (1st Cir. 1985); *United States* v. *Rogers*, 751 F.2d 1074, 1077-1079 (9th Cir. 1985); *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). See also *United States* v. *Solomon*, 679 F.2d 1246, 1250-1251 (8th Cir. 1982).

In this case Judge Eisele scrupulously followed the dictates of *Morrison* and fashioned a remedy intended to "neutralize the taint" of the violation of petitioner's Sixth Amendment rights. He permitted petitioner to move for a continuance or a change of venue, concluding that "the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety" (I Pet. App. 38). The court of appeals concluded that the finding that these remedies would permit Meshbesher to remain as petitioner's attorney was not clearly erroneous (*ibid.*), and petitioner's challenge to that fact-bound conclusion is unavailing.[4]

Petitioner insists (Pet. 42-43) that Meshbesher could not discharge his duties so long as a disloyal employee in his firm might continue to furnish confidential materials to the government. But even if the remedial order of Judge Eisele—which brought new prosecutors into the case and flatly precluded any contact with the tainted materials—did not prevent the government from making future use of similar materials, any fear on counsel's part that the government might repeat its previous actions could have been dispelled by additional instructions of the trial court to the government; withdrawal by defense coun-

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[4] Petitioner contends (Pet. 44-47) that the court of appeals erred in applying a "clearly erroneous" standard to the district court's finding that withdrawal by petitioner's counsel was not required in light of the option to change venue and grant a continuance. According to petitioner, the court of appeals failed "to independently analyze whether Meshbesher's ethical duties, applied to the facts as found, forced him to withdraw" (Pet. 46). Petitioner fails, however, to adduce any legal authority that required Meshbesher, on this record, to withdraw as trial counsel.

sel was not required. Nor was counsel obliged to withdraw "because of the false criminal accusations being made against him" (Pet. 41). Petitioner's counsel was in no different position from any other defense attorney who has used a witness that the prosecutor believes in good faith to have given false testimony. Whether an attorney in that position should withdraw is a decision for the attorney to make, in consultation with his client and subject to court approval. In no sense was counsel compelled to make the choice that he made; certainly, petitioner points to no authority that required his attorney to withdraw. The trial judge, affirmed by the court of appeals, determined that the remedial order—carefully tailored to overcome the effects of the Sixth Amendment taint—would permit Meshbesher to continue as petitioner's attorney at the retrial. That fact-bound decision warrants no further review.[5]

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[5] Petitioner contends that the court of appeals erred in holding that he was not prejudiced by Meshbesher's withdrawal since petitioner's new attorney did a perfectly adequate job at trial. Relying on cases in which a defendant's counsel of choice has been improperly disqualified or otherwise removed by a district judge, petitioner asks the Court to decide whether, as a matter of constitutional law, prejudice should be presumed when an attorney has been wrongfully disqualified. Pet. 36-40. This case simply does not raise that question since the district court, affirmed by the court of appeals, held that Meshbesher could continue to represent his client. Petitioner nevertheless suggests (Pet. 40) that the Court "not be deterred from reviewing this case because of th[at] * * * alternate holding"; he argues that "alternate grounds for a holding are considered independent, and not dicta." But that principle governs only the precedential significance of alternative holdings of this Court (see *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 485-486 (1924)) ;

2. Relying on this Court's decision in *United States* v. *Dinitz*, 424 U.S. 600 (1976), petitioner contends (Pet. 47-56) that his conviction at the first trial was the product of " 'bad faith conduct by [the] judge * * * [intended] to prejudice his prospects for an acquittal' " (Pet. 48, quoting *Dinitz*, 424 U.S. at 611); accordingly, he contends, the Double Jeopardy Clause barred his retrial. In rejecting that claim, the court of appeals chose not to decide the broad question whether the Double Jeopardy Clause may sometimes be invoked to bar retrial after a conviction has been reversed due to judicial misconduct. Pretermitting that issue, the court held that even if a retrial may sometimes be barred, Judge Lord's misconduct did not "evince the bad faith or design to prejudice the defendant's prospects for acquittal" sufficient to implicate the Double Jeopardy Clause (I Pet. App. 48-54). That decision is plainly correct and does not warrant further review.

We note, first, that this Court would seem to have foreclosed the broader double jeopardy claim pressed by petitioner, stating repeatedly in its decisions that,

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it is not a reason for the Court to review constitutional questions raised, if at all, only in alternative holdings of courts of appeals. In any event, in each of the cases cited by petitioner (Pet. 38-40) for the proposition that prejudice need not be shown when counsel of choice has been improperly disqualified, the remedy imposed by the court of appeals was a new trial, not dismissal of the indictment. See, *e.g.*, *United States* v. *Washington*, 782 F.2d 807, 813 n.7 (9th Cir. 1986); *United States* v. *Rankin*, 779 F.2d 956, 961 (3d Cir. 1986); *Linton* v. *Perini*, 656 F.2d 207, 212 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *Gandy* v. *Alabama*, 569 F.2d 1318, 1328 (5th Cir. 1978). Petitioner has already received a second trial, at which his counsel of choice elected not to represent him.

with the narrow exception of reversals predicated upon an insufficiency of the evidence, the Double Jeopardy Clause does not preclude the government from retrying a defendant whose conviction has been reversed on appeal. In *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), the Court, setting forth the "general principles [that] emerge from the Court's double jeopardy decisions and [that] may be regarded as essentially settled" (449 U.S. at 127), stated, "if the first trial has ended in a conviction, the double jeopardy guarantee 'imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside' " (*id.* at 131, quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969) (emphasis in original)). From this rule the Court in *DiFrancesco* identified one—and only one—exception: "the Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence" (*ibid.*). More recently, in *Oregon* v. *Kennedy*, 456 U.S. 667, 676 n.6 (1982), the Court reiterated that "[t]his Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence." Accord, *Greene* v. *Massey*, 437 U.S. 19, 25-26 (1978) (reversal based on "trial error" rather than sufficiency of the evidence "would not prevent a retrial"); *Burks* v. *United States*, 437 U.S. 1, 15 (1978) ("reversal for trial error"—such as "incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct"—"as distinguished from evidentiary insufficiency, does not constitute a decision to the effect

that the government has failed to prove its case. * * * When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished"); *Dinitz*, 424 U.S. at 610; *United States* v. *Tateo*, 377 U.S. 463, 465-466 (1964); *United States* v. *Ball*, 163 U.S. 662, 672 (1896). But see, *e.g.*, *United States* v. *Curtis*, 683 F.2d 769, 773-776 (3d Cir.) (characterizing the issue as not yet settled by this Court), cert. denied, 459 U.S. 1018 (1982); *United States* v. *Singleterry*, 683 F.2d 122, 123-124 (5th Cir.) (same), cert. denied, 459 U.S. 1021 (1982). Petitioner's conviction was set aside because of judicial misconduct, not because of any insufficiency in the evidence. There was thus no double jeopardy bar to retrying him.

Petitioner notes (Pet. 48, 51) that, under *Dinitz* and *Kennedy*, judicial misconduct amounting to "bad faith" and intended "to avoid an acquittal" may preclude a retrial when it provokes a mistrial; he reasons that the same rule should bar a retrial where, as here, a conviction has been reversed because of judicial improprieties that should have prompted the district court to grant a mistrial, but failed to. Even were this a plausible reading of the cases, the court of appeals was plainly correct in holding that, on this factual record, petitioner has failed to show that the misconduct of Judge Lord either was exercised in "bad faith" or was intended to prejudice petitioner's case. Judge Eisele held extensive hearings that were devoted, in large part, to the misconduct of Judge Lord; and the court of appeals conducted a meticulous review of that record. It determined that Judge Lord's conduct did "not evince the bad faith or de-

sign to prejudice the defendant's prospects for acquittal" sufficient to implicate double jeopardy concerns. That fact-bound judgment warrants no further review. See *Kennedy*, 456 U.S. at 675 (the decision whether a prosecutor intended to provoke a mistrial "calls for the court to make a finding of fact"); *Curtis*, 683 F.2d at 776-778; *Singleterry*, 683 F.2d at 125.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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